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IN THE

Supreme Court of the United States

October Term, 1962.

No. 575

UNITED STATES OF AMERICA

v.

RUDOLPH R. BREGMAN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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RUDOLPH R. BREGMAN,

Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit affirming the judgment of the United States District Court for the Eastern District of Pennsylvania which had sentenced petitioner for a criminal violation of the Internal Revenue Code of 1954.

OPINIONS BELOW.

The Opinion of the District Court has not yet been reported. It appears at page 6a of the Joint Appendix and a Supplemental Opinion appears at page 12a of the Joint Appendix. The Opinion of the Court of Appeals has not yet been reported but appears as Appendix A to this Petition commencing at page 15. The Opinion of the Court of Appeals on Petition for Rehearing and the Dissenting Opinion have not yet been reported but appear as Appendix B to this Petition commencing at page 21.

JURISDICTION.

The judgment of the Court of Appeals was entered on July 2, 1962. A Petition for Rehearing was denied on October 5, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) and Rule 22(2) of the Federal Rules of Criminal Procedure.

QUESTIONS PRESENTED.

1. Where, under Section 6331 of the Internal Revenue Code of 1954 a levy is authorized "upon all property and rights to property" but Section 7206(4) provides penal sanctions only for removal or concealment of "any property upon which levy is authorized by Section 6331", does this criminal provision authorize indictment for removal or concealment of "rights to property"?

2. Was petitioner convicted of a charge not made in the indicement in violation of the Fifth and Sixth Amendments to the U. S. Constitution?

3. Is a mere bookkeeping entry which *falsely* states that 18 Strick Trailers had been repossessed by a lienholder sufficient to sustain a conviction (a) that petitioner did knowingly and unlawfully *remove* "eighteen (18) Strick Trailers" or (b) that petitioner did knowingly and unlawfully *conceal* "eighteen (18) Strick Trailers" absent evidence that such entry was in any way exhibited to or brought to the attention of any government officer or employee?

CONSTITUTIONAL, STATUTORY AND PROCEDURAL RULES PROVISIONS INVOLVED.

The following constitutional and statutory provisions are relevant:

1. United States Constitution, Amendment V: "No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; . . . nor be deprived of life, liberty or property without due process of law . . ."

2. United States Constitution, Amendment VI: "In all criminal prosecutions the accused shall enjoy the right . . . to be informed of the nature and cause of the accusation . . ."

3. Section 6331 of the Internal Revenue Code of 1954 provides in relevant part as follows: "(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . ."

4. Section 7206 of the Internal Revenue Code of 1954 provides in relevant part for criminal penalties against: "Any person who—(4) Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is

authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title . . . ."

5. Rule 7 of the Rules of Criminal Procedure, 18 U. S. C. A. p. 176, provides in pertinent part as follows: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

STATEMENT OF THE CASE.

This is a criminal proceeding instituted by the United States against Rudolph R. Bregman and Milton H. L. Schwartz charging a violation of Section 7206(4) of the Internal Revenue Code of 1954.[1]

The indictment charged that the defendants: "with intent to evade and defeat the collection of taxes assessed against Rudolph Motor Service, Inc., did knowingly and unlawfully remove and conceal eighteen (18) Strick Trailers, property of Rudolph Motor Service, Inc., upon which a levy was authorized by Section 6331 of the Internal Revenue Code of 1954."[2]

The case was tried to a jury at Philadelphia in the Eastern District of Pennsylvania.

At the trial no evidence was offered to support a charge of actual removal or concealment of the eighteen (18) Strick Trailers as they remained at all relevant times in the terminals of Rudolph Motor Service, Inc. or transporting goods from one such terminal to another (Joint Appendix, p. 6a). There was, however, sufficient evidence presented from which a jury could find that a *false* entry was made on the books of Rudolph Motor Service, Inc.[3] purporting to change the right to possession of these trailers, the title to them having been reserved at all relevant times by the Strick

---

1. 26 U. S. C. A. § 7206(4).

2. At the arraignment, a motion for a bill of particulars was filed on behalf of defendant Schwartz. After hearing, an order was entered by the hearing Judge, refusing defendant Schwartz's request to be informed where this property was removed from, where it was removed to and in what manner it was concealed. However, in the Reply Brief filed to defendant Schwartz's motion, the Government indicated that the information sought was set forth in the books and records of Rudolph Motor Service, Inc. This Brief was never served on defendant Bregman, the present Petitioner.

3. It is conceded by the Government in their Brief filed with the trial court on June 9, 1961 that the false entries in the books were never exhibited to the Internal Revenue agents.

Company which had sold them to Rudolph Service, Inc. under a conditional sales contract. At the conclusion of the Government's case motions for judgment of acquittal were made on behalf of both defendants but ruling was reserved by the trial judge. Thereafter, the defendants rested without producing any evidence and renewed their motions for judgment of acquittal but ruling was again reserved.

The case was submitted to the jury which found Petitioner Bregman guilty and could not agree as to defendant Schwartz. The motion for judgment of acquittal on behalf of both defendants was again renewed and was refused by the trial court on June 28, 1961.

The Court on September 13, 1961 entered the following judgment of sentence:

> "The defendant Rudolph R. Bregman is committed to the custody of the Attorney General of the United States for a period of four years. He is to undergo imprisonment for a period of six months. The execution of the remainder of the sentence is suspended and defendant is placed on probation for a period of three years, six months to begin at the expiration of the prison sentence imposed."

Petitioner duly appealed to the Court of Appeals for the Third Circuit which affirmed the judgment (Appendix A hereof, pp. 15-20). A Petition for Rehearing was denied in a Per Curiam Opinion (Appendix B hereof, p. 21) from which Chief Judge Biggs dissented (Appendix B hereof, pp. 21-22).

REASONS FOR GRANTING THE WRIT.

1. The Case, While One of First Impression Under the Internal Revenue Code of 1954, Presents a Sharp Conflict With All Pertinent Decisions Under Predecessor Statutes.

The Internal Revenue Code of 1954 provides in Section 6331 that a levy may be made on "all property and rights to property on which a lien is provided for the payment of a tax". The criminal sanction, however, as provided by Section 7206(4) of the same Code, omits all reference to "right to property" and provides instead that it shall be a felony to remove, deposit or conceal "any goods or commodities for or in respect whereof any tax is or shall be imposed or any *property* upon which levy is authorized by Section 6331, etc." (Emphasis supplied.)

Prior to 1954 the predecessor section of Section 7206(4) was Section 3321(a) of the 1939 Internal Revenue Code which proscribed removal, deposit or concealment "of any goods or commodities for or in respect whereof any tax is or should be imposed with intent to defraud the United States of such tax". An examination of the House and Senate Committees' reports relating to the 1954 Code reveals that the only difference created by the new penal provision was to cover similar offenses as were formerly proscribed under Section 3321(a) but which were committed in order to avoid levy.[4]

Since there have been no reported cases under Section 7206(4) of the 1954 Code the dissenting opinion of Judge Biggs correctly describes this as a case of first impression. But there are a number of cases in which the courts have

4. House and Senate Report 1954 United States Code Congressional and Administrative News, pages 4573, 5252: "This Section differs from Section 3321(a) of the 1939 Code in that this Section covers such offenses committed in order to avoid levy."

uniformly held in respect of its predecessor Section 3321(a) (the words "remove" and "conceal" are in each) which demonstrate that never before have the courts held that anything less than a physical removal, concealment or transfer from one particular place to another would suffice. See *U. S. v. Perfetti*, (E. D. of Pa., 1950), 91 F. Supp. 909; *Yellow Mfg. Accept. Corp. v. U. S.*, 84 F. 2d 164; *Auerbach v. U. S.*, 136 F. 2d 882.

Petitioner emphasizes that the criminal penalty of Section 7206(4) is not imposed upon a removal or concealment of "rights to property" although under Section 6331 a levy is authorized upon such "rights to property". There would seem to be no justifiable extension of the penal provisions to include "rights to property", particularly since both concepts are utilized in the civil sanction which is specifically referred to in the penal one. Congress, having the distinction directly before it, could have easily penalized the removal or concealment of "rights to property" just as it had authorized a levy in the civil sanction. But it did not do so. Clearly Congress knew the uniform meaning given by the courts to the words "remove", "conceal", "property" and "rights to property" and that they had held that the penal sanction of this federal law applied only to a physical removal or concealment.

The trial judge nevertheless held that the word "property" included "rights to property" and cited a Pennsylvania case which (in another context) so holds. *Wilcox v. Penn Mutual Life Insurance Co.*, 357 Pa. 581. But in construing a federal penal statute, no such broad meaning is to be imputed to the word "property" when used in a context which shows clearly that Congress was distinguishing between "property" and "rights to property". Surely, in the absence of anything in the statute clearly indicating an intention to the contrary, where the same word or phrase is used in different parts of a statute, it must be presumed to be used in the same sense throughout. See *Scholler v. U. S.*, 231 F. 2d 450.

2. Petitioner Was Convicted on a Charge for Which He Had Not Been Indicted.

Petitioner has argued above that the penal provisions of the Internal Revenue Code of 1954, which proscribes removal or concealment of property, does not extend to removal or concealment of rights to property. Assuming, however, that this contention is wrong and petitioner could have been indicted on either charge or on both, it becomes clear that he was convicted upon a charge not made in the indictment. If this is so, it is fatal. *DeJonge v. Oregon*, 299 U. S. 353; *Stirone v. U. S.*, 361 U. S. 212. Rule 7 of the Rules of Criminal Procedure, 18 U. S. C. A. p. 176, provides in pertinent part: "The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

In accordance with the Sixth Amendment and this Rule, the government plainly, concisely, and definitely informed petitioner that he "did knowingly and unlawfully remove and conceal eighteen (18) Strick Trailers . . ." Assuming, therefore, that petitioner could have been indicted for removing or concealing his right to possession of the trailers or some other property right in them, it still seems to be beyond cavil that what he was actually charged with was removing and concealing the trailers themselves. It is perfectly clear from the Joint Appendix filed herein and from the Opinions of the Court of Appeals that there was neither a removal nor concealment of any of these trailers.[5]

Since the indictment charged a violation of one statutory provision the prosecution may not prove violation of an alternative charge which is not contained in the indict-

5. Thus the trial judge says in his opinion: "No evidence offered during the trial supported a charge of physical removal or concealment of the eighteen Strick Trailers, which remained at all relevant times in the same terminals or transporting goods from one such terminal to another." (Joint Appendix 6a.) The trial court never treated the book entry as evidence of physical removal or concealment (Joint Appendix 6a, 7a, 8a, 9a, 10a).

ment. Petitioner submits this was clearly held in *Stirone v. U. S.*, 361 U. S. 212, which also came up from this circuit and petitioner finds it hard to understand why, in the light of the dissent of Chief Judge Biggs (both here and in *Stirone*) the *Stirone* case was not followed by the majority.

In the third circuit some of the trial and appellate court judges apparently believe that *Stirone v. U. S., supra,* did not mean precisely what it said. True, it did not specifically overrule *Berger v. U. S.*, 295 U. S. 78, but instead the *Berger* case was cited with approval in *Stirone*. Hence, the judges of this circuit seem to believe that the *Berger* rule poses in each case merely a question as to whether a variance is fatal on the harmless error theory. In the present case, the trial judge took this view. In his opinion he worked it out that if there was a variance it was not fatal because a *co-defendant's* motion for bill of particulars was granted and by that motion the government informed the co-defendant that "the books and records of Rudolph Motor Service, Inc. clearly set forth what action took place concerning these trailers". The trial judge then held that it thus became clear to petitioner's co-defendant Schwartz that the government had intended to rely upon a book entry (7a) and hence its case "must have concerned concealment of rights to property rather than the property (the trailers) itself." Despite the fact that (1) the *indictment* clearly charged only the removal and concealment of the trailers themselves, and (2) the bill of particulars was furnished to a co-defendant and not to petitioner, nevertheless the court held petitioner could not properly claim that he failed to inspect the record as to co-defendant's motion, hence the variance was not fatal! (Joint Appendix 13a).

It is submitted that there is involved here no mere question of immaterial variance but that in fact the petitioner has been deprived of his constitutional right under the Fifth Amendment to be indicted by a grand jury and under the Sixth Amendment to be informed of the nature and cause of the accusation by the indictment itself and not

indirectly by a prosecutor's furnishing an ambiguous bill of particulars to a co-defendant. The Sixth Amendment requires that the indictment give notice of the "accusation." But the trial court held that the bill of particulars changed this "accusation" from a charge of physical removal or concealment to a charge of removal or concealment of intangible "rights to property." Only an indictment accuses; a bill of particulars does not amend the charging part of an indictment. Nothing can. *Stirone v. United States, supra.* Petitioner's conviction has been permitted on a charge not made in the indictment.

3. Petitioner's Conviction Was Not Proper Under Any Theory.

Petitioner now contends that even if everything he has argued above is wrong nevertheless his conviction was improper. For the purposes of arguing this point it will be assumed that the statute authorized conviction for removal or concealment of "rights to property" and also that the indictment had validly and specifically restricted itself to such charge. Still it is clear that both the trial judge and the Court of Appeals have been confused as to the proper effect to be given this false book entry.

As noted above, there was evidence to show that a book entry of Rudolph Motor Service, Inc. indicated that the trailers had been repossessed by the company from which they had been purchased. As the government properly contended, this entry was false. The trailers had not been repossessed. The falsity of this book entry would, therefore, give rise to an inference that whatever it was that petitioner did was done with the requisite criminal intent. The question still remains whether, even so, he "removed" or "concealed" anything.

(1) *As to removal:* Since it is conceded by all that the entry was false there was, in fact, no removal of either property or rights to property. It is the very falsity of the entry which demonstrates this fact. Had the entry been

true there would have been a "removal" leaving open only the question of whether a "repossession" constitutes a voluntary or involuntary removal.

(2) *As to concealment:* The Court of Appeals held that this false entry amounted to a "concealment" of "rights to property" and would appear to have sustained the conviction on that ground under authority of *U. S. v. Schireson*, 116 F. 2d 881, which involved a criminal indictment for concealment of a bankrupt's assets. But in *Schireson* there was a falsified schedule of assets *filed* with the Trustee in Bankruptcy thus constituting a concealment from him; but in the present case the prosecution admits that the false entry made on the books of the corporation was not exhibited to or filed with any government official or employee. The present case, therefore, is as if *Schireson* had made a false schedule of assets but had not filed it. Can the Court have properly held, on such facts, that this conduct constituted a criminal "concealment"?

Petitioner submits that the very fact that the book entry was false demonstrates that there was no removal of anything, criminal or otherwise, and that the mere false book entry, not exhibited to anybody, does not constitute punishable concealment.

CONCLUSION.

If this decision is permitted to stand it will not only end a century of uniform interpretation by the courts of this important criminal sanction but will set the course of law enforcement upon a new uncharted course in plain contravention of the ground rules laid down in *DeJonge v. Oregon* and *Stirone v. U. S.*

For the reasons set forth herein petitioner respectfully submits that this petition for a writ of certiorari should be granted.

THOMAS D. MCBRIDE,
Attorney for Petitioner.

Certificate of Service.

I certify that I have served by mail upon the Solicitor General of the United States, Department of Justice, Washington 25, D. C., five copies of the foregoing Petition for a Writ of Certiorari and that I have served five copies thereof by mail upon the United States Attorney, U. S. Courthouse, Philadelphia, Pa.

THOMAS D. MCBRIDE,
Attorney for Petitioner.

APPENDIX "A".

Opinion of the Court.

(Filed July 2, 1962)

Before GOODRICH, MCLAUGHLIN and KALODNER, *Circuit Judges*

By KALODNER, *Circuit Judge*

Following a jury trial, defendant-appellant Rudolph R. Bregman was found guilty * of violation of Section 7206(4) of the Internal Revenue Code of 1954 [1] which, inter alia, makes removal or concealment of property upon which a levy is authorized by Section 6331 [2] of the Code a felony.

* The jury was unable to agree on a verdict with respect to defendant Schwartz.

1. Section 7206. "Fraud and false statements." reads in relevant part as follows:

"Any person who—

"(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or"

2. Section 6331. "Levy and distraint" provides in relevant part as follows:

"(a) Authority of Secretary or delegate.—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person or on which there is a lien provided in this chapter for the payment of such tax. . . ."

Bregman prosecutes this appeal from the District Court's judgment of sentence, entered following denial of his motion for judgment of acquittal.

Two questions are presented:

(1) Does Section 7206(4) make criminal a book entry which falsely reflects a change in the right to possession of property;

(2) Was there a fatal variance between the indictment and proof?

The one-count indictment charged the defendants as follows:

> "That on or about October 30, 1954, at Philadelphia, in the Eastern District of Pennsylvania, Rudolph R. Bregman and Milton H. L. Schwartz, with intent to evade and defeat the collection of taxes assessed against Rudolph Motor Service, Inc., did knowingly and unlawfully remove and conceal eighteen (18) Strick Trailers, property of Rudolph Motor Service, Inc., upon which a levy was authorized by Section 6331 of the Internal Revenue Code of 1954,
>
> "In violation of 26 U. S. C. Section 7206(4)."

Viewing the evidence in the light most favorable to the government, as the jury's verdict required, the critical facts may be stated as follows:

Bregman was president of Rudolph Motor Service, Inc. ("Rudolph"); his co-defendant Schwartz was its counsel. In the fall of 1953 Rudolph owed various federal taxes and revenue agents demanded their payment. Rudolph then had possession of, and record title to, the 18 Strick trailers referred to in the indictment. At that time, acting for Rudolph, Bregman and Schwartz promised the government agents to pay the taxes in arrears and urged them not to file tax liens against Rudolph's property, including the 18 trailers. The promise to pay was not fulfilled. On October

30, 1954 Bregman made false entiries in the corporate records of Rudolph indicating that the 18 trailers had been "repossessed" as of that date.

Bregman here concedes that "there was sufficient evidence presented from which a jury could find that an entry was made on the books of Rudolph Motor Service, Inc. changing the right to possession" of the 18 Strick trailers, but he says, (1) making a false book entry which changes right to possession does not violate Section 7206(4), and, (2) if it does, he was only charged in the indictment with removal and concealment of "18 Strick Trailers, property of Rudolph Motor Service, Inc.", and not with making a false book entry with respect to the trailers.

The thrust of Bregman's argument with respect to his first contention is that Section 7206(4) relates only to the physical removal or concealment of property and the courts, he says, have uniformly so held in construing its predecessor statute, Section 3321(a) [3] of the Internal Revenue Code of 1939, which was in turn derived from R. S. 3450, as amended by the Act of June 26, 1936. He further urges that the fact that Section 7206(4) extended the provisions of Section 3321(a) to include offenses committed in order to avoid levy does not extend the sweep of the section to "rights to property", dealt with in Section 6331 of the 1954 Code, relating to levies.

Bregman has cited to us decisions in prosecutions under predecessor sections of Section 7206(4) which he says held it was necessary for the government to prove a *physi-*

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3. Section 3321(a) of the Internal Revenue Code of 1939 reads as follows:

"§ 3321. Removal or concealment with intent to defraud the revenue.

"(a) Penalty. Every person who removes, deposits, or conceals, or is concerned in removing, depositing, or concealing any goods, or commodities for or in respect whereof any tax is or shall be imposed with intent to defraud the United States of such tax or any part thereof, shall be liable to a fine of not more than $5,000 or be imprisoned for not more than 3 years, or both."

cal removal, concealment or transfer from one place to another in order to constitute their violation.

We have considered these decisions,[4] and hold them to be totally inapposite on their facts to the situation in the instant case. Moreover, in none of these decisions was there even an obiter expression which would support Bregman's contention, in substance, that it was necessary to have physical concealment of the trailers here in order to constitute violation of Section 7206(4).

Bregman's next contention is that while Rudolph had the right of possession with respect to the trailers it did not have the unrestricted right to "dispose" of them and thus they were not its "property" under the common law concept of property as "the right of any person to possess, use, enjoy and *dispose* of a thing." (Emphasis supplied.)

The short answer to this contention is that under the provisions of the Pennsylvania Uniform Commercial Code, 12A P. S. § 9-311, Rudolph *had the right to dispose* of the trailers, and moreover, the trailers "could be reached by attachment, levy, garnishment or other appropriate judicial process."

It is settled that State law controls in determining the nature of the legal interest which the taxpayer has in property and both federal and state courts must look to the state

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4. In United States v. Perfetti, 91 F. Supp. 909 (E. D. Pa. 1950), cited by Bregman, the indictment, under Section 3321(a) charged the defendants with *removing* cans of untaxed alcohol and the trial court granted defendant's motion for acquittal on the ground that the evidence did not support the charge of *removal*.

In Cadillac Automobile Motor No. 61-D-476 v. United States, 7 F. 2d 102 (6 Cir. 1925), where the government sought forfeiture of a vehicle under R. S. 3450 because it had allegedly been used for the removal and concealment of cocaine subject to tax the Sixth Circuit reversed the condemnation ordered by the District Court on the ground that the evidence had failed to establish that the non-owner of the car was concealing or transporting the cocaine with intent to defraud the government of the tax.

The other cases cited by Bregman are akin to *Perfetti* and *Cadillac Automobile Motor*.

law to ascertain whether and to what extent the taxpayer had "property". Aquilino v. United States, 363 U. S. 509, 512, 513 (1960); United States v. Bess, 357 U. S. 51, 55 (1958); Morgan v. Commissioner, 309 U. S. 78, 82 (1940).

Since under Pennsylvania law the government could have levied upon the trailers for taxes due it we are of the opinion that the false entries made by Bregman on Rudolph's corporate records with respect to the trailers constituted a violation of Section 7206(4).

We see no merit to Bregman's second point—that there was a fatal variance between the indictment and the proof because the indictment charged concealment of "eighteen (18) Strick Trailers, property of Rudolph Motor Service, Inc." and the government's proof only established a false entry with respect to possession of the trailers.

When Bregman falsified Rudolph's corporate records to show that the trailers had been "repossessed" the effect of that falsification was to "conceal" Rudolph's possession of the trailers. What was said by Judge Goodrich, speaking for this Court, in United States v. Schireson, 116 F. 2d 881 (1941), at page 884, on the score of the offense of concealment, is dispositive of Bregman's fatal variance contention:

> "In connection with the problem of analyzing what is involved in this offense [concealment as proscribed by Bankruptcy Act] it must be borne in mind that the word 'conceal' does not mean merely to secrete or hide away. It means, also, 'to prevent the discovery of or to withhold knowledge of'. If a bankrupt owned land with an office building on it, it is hardly conceivable that he could physically hide it away. Yet there could be no doubt that he would be concealing this asset from the trustee by failing to disclose his ownership. . . . So, here, *if the bankrupt falsified his schedule of assets in Philadelphia he 'withheld knowledge of' them from his trustee and thereby concealed them* no matter where the goods were located." (emphasis supplied)

The government's proof that Bregman falsified the records pertaining to the trailers—property of Rudolph—to show that they had been "repossessed" was foursquare with the charge of "concealment" in the indictment and not by any stretch of the imagination at variance with it.

United States v. Raysor and Mosley, 294 F. 2d 563 (3 Cir. 1961) and United States v. Carabasi, 292 F. 2d 362 (3 Cir. 1961) cited by Bregman are inapposite on their facts to the situation here. The same is true with respect to United States v. Lippi, 190 F. Supp. 604 (D. Del. 1961).

For the reasons stated the judgment of sentence of the District Court will be affirmed.

Judge Goodrich participated in the consideration of this case but died prior to the filing of this opinion.

APPENDIX "B".

Opinion Sur Petition for Rehearing

(Filed October 5, 1962)

Present: BIGGS, *Chief Judge*, MCLAUGHLIN, KALODNER, HASTIE, GANEY and SMITH, *Circuit Judges*

PER CURIAM:

The petition for rehearing presents nothing that was not fully considered and decided in this appeal.

The petition is denied.

BIGGS, *Chief Judge*, dissenting.

This is a case of first impression. I believe that the majority has not decided it properly. The indictment charged that Bregman "did knowingly and unlawfully remove and conceal" eighteen trailers. See 26 U. S. C. A. § 7206(4), 1954 Revenue Code. There was no actual removal or physical concealment of the trailers. There was very substantial evidence that the trailers had been repossessed by another company. This is the "removal and concealment" relied on by th United States. A motion for judgment of acquittal was refused by the trial court.

Section 6331 of the Internal Revenue Code, 1954, 26 U. S. C. A. § 6331, authorizes the Secretary of the Treasury to levy "upon all property and rights to property" on which a lien is "provided" by the Internal Revenue Code, but in imposing criminal responsibility under Section 7206 (4) of the 1954 Code, Congress proscribed only the removal or concealment of "property". It would appear, therefore,

that Congress clearly intended to distinguish between the civil right of levy on "property or rights to property" and a criminal violation by the removal or concealment of "property". This distinction is overlooked in the opinion of this court filed on July 2, 1962.

Assuming, as I believe to be the fact, that Section 7206(4) refers only to the removal or concealment of "property" and not to the removal or concealment of "rights to property," then some physical act of removal, concealment, or transfer would be required to constitute a violation of the statute. There have been no reported decisions interpreting Section 7206(4) of the Revenue Code of 1954, but the decisions under Section 3321(a) of the 1939 Code and the other prior statutes have held that physical removal, concealment or transfer from one place to another was required to constitute a violation of the statutes. Yellow Mfg. Acceptance Co. v. United States, 84 F. 2d 164 (9 Cir. 1936); United States v. Perfetti, 91 F. Supp. 909 (E. D. Pa. 1950). See Auerbach v. United States, 136 F. 2d 882 (6 Cir. 1943). There is no indication of any intent on the part of Congress to broaden the reach of the statute by the 1954 codification.

A criminal statute must, of course, be strictly construed. But even under a most liberal construction, it would seem that Bregman was convicted upon a charge not made in the indictment. If I am correct in so stating, his motion for judgment of acquittal should have been granted. DeJonge v. Oregon, 299 U. S. 353, 362 (1937). See Stirone v. United States, 361 U. S. 212 (1960).

For these reasons I must respectfully dissent from the denial of rehearing. The case is surely one which merits the attention of a court en banc.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 575

RUDOLPH R. BREGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

Opinions (R. 6a–15a) [1] of the district court, dated June 28, 1961, and August 31, 1961, denying petitioner's motions for judgment of acquittal are not reported. The opinions of the court of appeals (Pet. 15–22) affirming the conviction and denying a petition for rehearing have not yet been reported.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 1962 (Pet. 15–20) and rehearing was de-

[1] The record in this Court consists of the Joint Appendix filed in the court of appeals, references to which will be designated "R." We have obtained a transcript of the trial proceedings (which was never submitted to the court of appeals) and have lodged it with the Clerk of this Court. References to the transcript will be designated "Tr."

nied on October 5, 1962 (Pet. 21-22). The petition for a writ of certiorari was filed on November 5, 1962. The jurisdiction of this Court is invoked under 28 U.S.C., 1254(1).

QUESTIONS PRESENTED

Petitioner was indicted for removing and concealing property of a corporation (eighteen motor trailers), upon which a levy was authorized under the internal revenue laws, with intent to defeat the collection of corporate taxes. The evidence showed that petitioner, while promising to clear up deficiencies in corporate taxes, caused false entries to be made in the corporate books in order to show that the trailers, held by the corporation under conditional sales contracts, had been repossessed by the vendor. Simultaneously, petitioner caused another of his closely-held corporations to reflect on its books the acquisition of the trailers. The questions presented are:

1. Whether the corporation had a "property" interest, or only "rights to property," in the trailers.

2. Whether the evidence established "removal" or "concealment" of the trailers within the meaning of Section 7206(4), Internal Revenue Code of 1954.

STATUTES INVOLVED

Internal Revenue Code of 1954:

> SEC. 7206. FRAUD AND FALSE STATEMENTS.
>
> Any person who—
>
> * * * * *
>
> (4) *Removal or Concealment with Intent to Defraud.*—Removes, deposits, or conceals, or is concerned in removing, depositing, or con-

cealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title:

* * * * * *

(26 U.S.C. 1958 ed., Sec. 7206.)

SEC. 6331. LEVY AND DISTRAINT.

(a) *Authority of Secretary or Delegate.*—If any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary or his delegate to collect such tax (and such further sum as shall be sufficient to cover the expenses of the levy) by levy upon all property and rights to property * * * belonging to such person * * *

* * * * * *

(26 U.S.C. 1958 ed., Sec. 6331.)

Pennsylvania Uniform Commercial Code, 12A Purdon's Pennsylvania Statutes Annotated, Sec. 9–311:

Alienability of Debtor's Rights.

A debtor's rights in collateral—

(a) are alienable, although the security agreement may make disposition without the secured party's consent a default; and

(b) may be reached by attachment, levy, garnishment or other appropriate judicial process. (1953, April 6, P.L. 3, Sec. 9–311.)

STATEMENT

Defendant and his attorney, Milton H. L. Schwartz, were indicted on March 1, 1960, under Section 7206

(4), Internal Revenue Code of 1954, in that "with intent to evade and defeat collection of taxes assessed against Rudolph Motor Service, Inc. [they] did knowingly and unlawfully remove and conceal eighteen (18) Strick Trailers, property of Rudolph Motors Service, Inc., upon which a levy was authorized by Section 6331 of the Internal Revenue Code of 1954". (R. 5a.) A jury sitting in the Eastern District of Pennsylvania convicted petitioner Bregman on June 13, 1961, but was unable to reach a verdict as to his co-defendant. Bregman was sentenced on September 13, 1961, to four years in prison, of which three and a half years were suspended. (Pet. 6.) The court of appeals affirmed.[2]

As stated by the court below (Pet. 16–17), the evidence showed that Rudolph Motors Service, Inc. was a closely-held corporation of which petitioner was president; that, in 1953, the company owed various federal taxes; that petitioner induced the Internal Revenue Service not to levy on the corporate property, promising that the taxes would be made good; that, during the period of its delinquency, the corporation held eighteen trailers under a conditional sales contract; and that, while the government forebore from levying at petitioner's urging, false entries were made on the corporate records indicating that the trailers had been "repossessed" by the conditional vendor as of October 30, 1954.

[2] On petition for rehearing, which was considered by the entire court, Chief Judge Biggs (who was not a member of the original panel) dissented.

The evidence also showed that petitioner pleaded with the Internal Revenue Service not to exercise its right to levy on corporate property and promised that the corporation would pay up the deficiencies (Tr. 86–95, 145–146); that he falsely informed revenue agents that the trailers had been repossessed by the vendor on October 30, 1954 (Tr. 732–736); that the deficiencies were not paid up (Tr. 655); that on November 1, 1954, petitioner caused the books of Rising Sun Truck Rental Company (which he controlled) to reflect acquisition of the conditional sales contracts on the trailers (Tr. 692–695); that he ultimately obtained title to the trailers himself (Tr. 707); and that he thereby defeated the right of the Internal Revenue Service to seize them by levy upon the assets of the corporation (Tr. 211–212).

ARGUMENT

1. Petitioner asserts that the corporation's interest in the subject trailers was merely a "right to property" and (Pet. 7–8) that, while Section 6331 (*supra*, p. 3) permits levies upon both "property" *and* "rights to property", Section 7206(4) makes criminal only the removal or concealment of "property".

But the interest of the corporation in the trailers was a "property" interest, not merely a "right to property". The corporation plainly had the right of possession, use, enjoyment, and (under controlling Pennsylvania law[3]) disposition of the subject trailers. No other label but that of "property" can be attached

[3] 12A Purdon's Pennsylvania Statutes Annotated, Sec. 9–311, *supra*, p. 3.

to such an interest. See *Willcox* v. *Penn Mutual Life Insurance Co.*, 357 Pa. 581, 595–596. A "right to property", as distinguishable from "property", is an intangible interest, not coupled with physical use or enjoyment, i.e., a chose in action. As Judge Learned Hand observed in *United States* v. *Metropolitan Life Ins. Co.*, 130 F. 2d 149, 151 (C.A. 2d):

> It seems very probable that the words "rights to property," introduced in 1866 at the same time that choses in action were first made leviable, were meant to cover them as distinguished from chattels described as "property"; at least it is hard to understand what else could have been intended. * * *

See, also, *Bensinger* v. *Davidson*, 147 F. Supp. 240, 245 (S.D. Cal.), in which the intangible right of a conditional vendee out of possession (that is, his claim against the conditional vendor for unjust enrichment) was said to be reachable by Government lien. Whatever may be the application of Section 7206(4) to choses in action, it is clear that the corporation's interest in the trailers was within the reach of the statute.

2. Petitioner argues (Pet. 9–12) that Section 7206 (4) requires a physical "removal or concealment", and that he could not be convicted under that statute because all that the prosecution proved was a false entry on the corporate books. But neither as a matter of language nor from the standpoint of the policy involved—protection of the revenue against fraud—is there any reason to imply a license to engage in particular types of concealment. None of

the cases cited by petitioner (Pet. 8) supports the proposition that there must be a *physical* concealment as opposed to that accomplished by a false book entry. In one of them, in fact, a conviction was upheld in circumstances where the jury was free, under the instructions of the trial court, to find the defendant guilty because he had submitted a false inventory of his liquor stock to a revenue agent. *Auerbach* v. *United States,* 136 F. 2d 882, 885 (C.A. 6th).[4] The court below properly relied here (Pet. 19) upon its previous definition of "concealment" in *United States* v. *Schireson,* 116 F. 2d 881, 884, an analogous case involving the concealment of assets in a bankruptcy proceeding by falsification of a schedule presented to the trustee.[5]

Furthermore, as we have shown in the Statement (*supra,* p 5), there was much more to the evidence of removal and concealment than (as petitioner would have it) a mere false book entry. The evidence established to the trial court's satisfaction (R. 6a, 9a), that petitioner, while pleading with the Internal Rev-

[4] In the *Auerbach* case, the court of appeals refused to consider an argument that the charge was erroneous, since there had been no objection to it at the trial. If the court had felt that there was merit in the argument, similar to that here presented by petitioner, presumably it would have reversed on the ground that the jury had been allowed to convict on an entirely erroneous theory.

[5] There is plainly no merit in petitioner's reliance upon *De Jonge* v. *Oregon,* 299 U.S. 353, and *Stirone* v. *United States,* 361 U.S. 212, for the contention that he was convicted of a charge not made in the indictment. The indictment charged, in the language of the statute, that he had concealed trailers which were the property of the corporation, and that is what the proof showed.

enue Service not to file liens against corporate property and while promising to make good the corporation's tax deficiencies, not only made false entries indicating repossession of the trailers by the vendor, but was also engaged in transferring the corporation's property in the trailers to another corporation, and ultimately to himself. By these acts, petitioner effectively destroyed the right of the Internal Revenue Service to levy upon the trailers, since the corporate taxes involved were Employment and Transportation taxes (Tr. 211–212) which the Revenue Service lacks authority to follow by a "transferee assessment" as it may do in the case of Income, Estate and Gift taxes.[6]

CONCLUSION

For the reasons stated, it is submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1963.

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[6] Section 6901(a), Internal Revenue Code of 1954 (26 U.S.C. 1958 ed., Sec. 6901(a)).